(13)

No. 95-1608

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and JOAN ANDERSON GROWE, Secretary of the State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. RESPONDENT'S ARGUMENTS WOULD IMPROPERLY EXPAND THE SCOPE OF POLITICAL PARTIES' ASSOCIATIONAL RIGHTS.

Respondent presents its arguments for invalidation of the Minnesota ban on ballot fusion as if it calls merely for application of well-established constitutional principles. In reality, however, Respondent would take this Court on a sojourn into uncharted constitutional waters. In numerous respects, Respondent asks the Court to expand the associational rights of political parties beyond that which this Court has previously recognized and beyond that which is justified under the First Amendment. Justice Stewart's characterization of a dissenting justice's argument for an Equal Protection Clause entitlement to proportional representation is equally applicable here: "Whatever appeal the [Respondent's] view may have as a matter of political theory, it is not the law." *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion).

A. Respondent Seeks To Expand The Right Of A Party To Select A Candidate Beyond Existing Bounds.

Respondent urges the Court to go beyond its prior rulings to hold that Respondent's associational rights are significantly burdened by Minnesota's ballot fusion ban, even though no candidate is precluded from appearing on the ballot, even though party members can endorse, support, campaign for, and vote for the candidate of their choice, and even though the party is permitted to appear on the ballot with "any candidate that the party can

convince to be *its* candidate." *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) (emphasis in original). The only limitation on Respondent's activity is that it cannot appear on the ballot if it selects a candidate who has chosen to run for another party. This Court has never struck down a statute with such minimal impact. Nothing in this Court's First Amendment jurisprudence suggests, much less necessitates, the expansion of a party's associational rights that would be necessary here to strike down the ballot fusion ban.

Specifically, Respondent asks the Court to expand beyond its prior decisions by holding that the interest in party autonomy protected under the right to association includes an apparently unfettered right not only to endorse, support, and vote for the candidate of choice, but to put that candidate on the ballot as the party's candidate even if he is already on the ballot as the candidate of another party. Petitioners demonstrated in their initial brief at 21-24 that the Court's references to the right of a party to nominate the candidate of its choosing in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), do not establish a right of the breadth that Respondent claims.

Respondent seeks further expansion of recognized party rights in arguing that it is not enough to be able to place *some* candidate on the ballot. Rather, Respondent contends that a party and its members have a right to

place on the ballot the *specific* candidate of their choice. Resp. Br. 22.[1]

Respondent's argument ignores the distinction this Court has recognized between regulations that preclude supporters from associating with and voting for a particular candidate and regulations that preclude certain political groups from placing any candidate on the ballot. As the Court explained in *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

> [A]lthough candidate eligibility requirements may exclude particular candidates, it remains possible that an eligible candidate will "adequately reflect the perspective of those who might have voted for a candidate who has been excluded." [L. Tribe, *American Constitutional Law*] at 774 n.2. But courts quite properly have "more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot." *Id.* at 774.

Anderson, 460 U.S. at 793 n.15. The same distinction, between laws that foreclose ballot access to all candidates a class of voters might support and those that keep only particular candidates off the ballot, was relied on by the Court in distinguishing the burden in *Anderson* from that created by the disaffiliation provision in *Storer v. Brown*, 415 U.S. 724 (1974). *Anderson*, 460 U.S. at 791 n.12 (quoted in Pet. Br. 39-40). Thus, the Court has not viewed a

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[1] Respondent erroneously argues that *Norman v. Reed*, 502 U.S. 279 (1992), requires the conclusion that the ability to nominate *some* candidate is not enough to satisfy its associational rights. Resp. Br. 22. The fallacy of this argument was addressed in Petitioners' Brief at 31 n.15.

political party's right of association as encompassing the right to place on the ballot any candidate of its choosing.

The ballot fusion ban is not the type of law described in the preceeding *Anderson* quotation that must be "more carefully appraised." In *Anderson* the Court struck down an early filing deadline law because it precluded a class of independent-minded voters from placing *any* candidate on the ballot. *Anderson,* 460 U.S. at 792-93. In contrast, Minnesota's ballot fusion ban only prevented Respondent from placing a *particular* candidate on the ballot, because he had already chosen to be the candidate of another party.

In this respect, the ballot fusion law is similar to a candidate eligibility statute. The fusion ban merely makes an individual ineligible to become the candidate of one party if she is already a candidate of another party. As the Court explained in *Anderson,* despite the exclusion of a particular candidate, "it remains possible that an eligible candidate will 'adequately reflect the perspective of those who might have voted for a candidate who has been excluded.' " Of course, the fusion ban is less restrictive than a typical candidate eligibility requirement because it does not keep any candidate off the ballot altogether.

Significantly, in candidate eligibility cases this Court has refused to recognize candidacy as a fundamental right. *Clements v. Fashing,* 457 U.S. 957, 963 (1982) (plurality opinion); *id.* at 978 n.2 (Brennan, J., dissenting) (noting "we have never defined candidacy as a fundamental right . . . . "); *Bullock v. Carter,* 405 U.S. 134, 142-43 (1972). It necessarily follows that a political party does not have the correlative right to place any candidate it chooses on the ballot.

Respondent would no doubt disagree and argue, as it has in trying to distinguish *Storer,* Resp. Br. 46-48, that its rights as a political party are greater and more "fundamental" than the rights of a candidate. However, the two cannot properly be separated in this context:

> So long as the ideas in which a potential candidate and other party members believe can be represented by another candidate, the primary purpose of political association has been served. A candidate may, of course, prefer to be the party nominee, but *judicial cognizance of that interest as an element of associational rights would be merely a backdoor way of establishing a right to candidacy.* . . . [S]o long as not all potential candidates espousing a specific viewpoint not inconsistent with declared party ideology are excluded, the political ideas of party members can be represented by other candidates. As a result, the ability of individuals to advance ideas through group association will not have been impaired.

Note, *Developments in the Law – Elections,* 88 Harv. L. Rev. 1111, 1176-77 (1975) (emphasis added; footnote omitted). The same reasoning is evident in Professor Tribe's explanation why the plurality's holding in *Clements* that candidacy is not a fundamental right is "entirely defensible:"

> [A]lthough groups of voters have a First Amendment-based right to associate so as to advance a candidate to represent their views, these associational rights do not seem to require that any *particular* individual serve as that candidate.

Laurence H. Tribe, *American Constitutional Law* 1098 n.5 (2d ed. 1988) (emphasis in original). It is precisely that

"First Amendment-based right to associate as to advance a candidate to represent their views" that Respondent must rely on here. Petitioners agree with Professor Tribe that that right does not extend, and should not be extended, to the selection of a particular candidate.

B. Respondent Seeks A New First Amendment Right To Use The Ballot As A Medium Of Political Expression.

Another example of Respondent's attempt to expand the scope of political party rights in the electoral context is its argument that it has a First Amendment right to use the ballot as a means of expressing to candidates and voters the strength of the party. It is because of this inability to demonstrate its strength through the State's counting of votes that Respondent claims the ballot fusion ban prevents third parties from gaining and maintaining popular support. Resp. Br. 8-9. This concept of using the ballot to send a message is also the basis for Respondent's argument that there is a constitutional right to a separate ballot line for each party even if they share a fusion candidate. Resp. Br. 26-28.

Noticeably absent from Respondent's argument is citation to any decision of this Court recognizing First Amendment protection for the expressive functions of the ballot Respondent advocates. To the contrary, as discussed in Pet. Br. 32-33, in *Burdick v. Takushi*, 504 U.S. 428 (1992), both the majority and the dissent firmly and unequivocally rejected the concept that the First Amendment guarantees a right to use the ballot for expressive purposes. As Justice Kennedy pointed out, "the purpose of casting, counting, and recording votes is to elect public

officials, not to serve as a general forum for political expression." *Id.* at 445 (Kennedy, J., dissenting).

Respondent and its amici attempt to minimize this rejection of the "ballot-as-political-expression" theory by suggesting that the Court in *Burdick* only rejected the right of one write-in voter to cast a protest vote for Donald Duck. Resp. Br. 27-28. *Burdick*'s significance is not so limited. While at its extreme a right of political expression through the ballot would protect even a protest vote for Donald Duck, the complete ban on write-in voting at issue in *Burdick* had much broader impact, but was nevertheless upheld. Moreover, Respondent's implicit suggestion that supporters of minor political parties enjoy a right to express themselves through the ballot while independent voters or those who wish to cast protest votes do not, invites a form of content and viewpoint-based discrimination that the First Amendment will not tolerate.[2]

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[2] A further reason to reject Respondent's attempt to expand the function of the ballot beyond election of public officials is demonstrated by historical perspective. As this Court has explained:

> During the Colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. . . .
>
> Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system.

Burson v. Freeman, 504 U.S. 191, 200 (1992). Thus, at the time the Bill of Rights was adopted, paper ballots were a rarity. It is hardly plausible that the Framers were concerned in adopting the First Amendment about protecting expressive content (beyond who was being voted for) of raising one's hand or shouting yea or nay.

Respondent's novel suggestion that the expressive content of casting a ballot is entitled to First Amendment protection should be rejected.

C. Respondent Would Expand The Concept Of Disproportionate Impact On Minor Parties.

Another refrain in Respondent's Brief is that Minnesota's ballot fusion ban must fall because it is not neutral. There is no dispute that this Court has held that "a burden that falls unequally on new or small political parties or on independent candidates impinges . . . on associational choices protected by the First Amendment." *Anderson*, 460 U.S. at 793. In arguing that the fusion ban has a disproportionate negative impact on minor parties, Respondent would extend this principle beyond the reach of the cases this Court has decided.

1. Right to a system that maximizes minor party opportunity for growth.

Respondent's disproportionate impact argument is premised on the greater need of minor parties to engage in ballot fusion. Resp. Br. 18. In order to gain and maintain popular support, Respondent argues, minor parties must be able to demonstrate strength at the polls and provide their supporters with candidates who have a chance of winning. They can do this only if they are able to place popular candidates of major parties on the ballot as their own, according to Respondent.

This disproportionate impact argument is ultimately grounded on the notion, embraced by the Eighth Circuit in this case, that minor parties have a right to an electoral

system that maximizes their ability to grow and thrive. Pet. App. 5-6. Since minor parties inherently have a greater need to attract new supporters than do major parties, any aspect of the electoral system that does not facilitate minor party growth, such as a winner-takes-all system, can be said to impose a disproportionate burden on minor parties in the same way as does the ballot fusion ban. As demonstrated in Petitioners' Brief at 25-35, neither this Court's decisions nor constitutional principles support the creation of such a right.

It is important to distinguish the nature of the burden on minor parties that Respondent argues must be alleviated by invalidation of the ballot fusion ban from the types of burdens that have required invalidation of election regulations in the Court's prior cases. The Court has struck down laws that discriminated against minor parties by excluding them from the ballot, *Anderson*, 460 U.S. at 792-94,[3] or prevented them from growing even if they were to attain widespread support, *see Norman*, 502 U.S. at 705-06 (see Pet. Br. 29-31). Respondent asserts a different and more expansive right. Respondent argues for a right to a system that not only recognizes and honors the popular support of the minor party, but a system that makes it easier for a party to obtain and retain popular support. While a system that encourages such growth may be laudable and desirable from the perspective of a political scientist, there is nothing in the jurisprudence of this Court or the First Amendment that makes such a system a right.

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[3] *Anderson* specifically involved rights of independent voters, but the Court made it clear that its rationale was applicable to similar burdens on minor parties. *Id.* at 793.

Furthermore, the cases cited by Respondent do not support its broad concept of impermissible disproportionate impact. In *Anderson*, the Court struck down Ohio's filing deadline of mid-March for independent presidential candidates in large part because of the disadvantage it placed upon supporters of independent candidates compared to the major parties, who would not adopt their nominees and platforms for another five months. 460 U.S. at 790-91. Respondent also relies on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), and the potential exemption recognized in those cases for minor parties from disclosure requirements upheld as to major parties. Those rulings are irrelevant. The rationale for allowing the exemption did not turn on the right of minor parties to a system that facilitates their growth. Rather, it was based on the recognition that for some unpopular minor parties the compelled disclosure of contributors names could subject them to "threats, harassment or reprisals . . . . " *Buckley*, 424 U.S. at 74. This was merely an application in the campaign regulation area of an established aspect of the right of association. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958) (compelled disclosure can unconstitutionally chill right of association). These cases contribute no support to Respondent's expansive disproportionate impact theory.[4]

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[4] Contrary to Respondent's implication, the Court in *Buckley* expressly *rejected* a request for a blanket exemption for minor parties. Instead, the Court held that an exemption should be granted on a case by case basis and only if a particular party could prove that it needed the protection of an exemption. *Buckley*, 424 U.S. at 72-74. That is what occurred in *Brown*.

2. Right to a voting cue on the ballot.

Respondent also contends that it is treated on an unequal basis by the ballot fusion ban because the State permits a major party to be identified with its candidate on the ballot but denies that right to the Respondent if it chooses to nominate the same candidate. Respondent even suggests that the law engages in censorship because some parties are allowed on the ballot and others are not. Resp. Br. 25. The flaw in this argument is that the State does not discriminate against any party or type of party regarding which party name appears on the ballot with a candidate. This is not a situation in which the State has declared that only major parties can be identified on the ballot, as in *Dart v. Brown*, 717 F.2d 1491 (5th Cir. 1983) (upholding state law that allowed party designation on ballot only for political parties that had demonstrated support of 5% of the state's voters), *cert. denied sub nom. Libertarian Party v. Brown*, 459 U.S. 825 (1984). On the contrary, the ballot fusion law plays no part in determining which party name appears on the ballot; that is a matter of the candidate's choice.

The ballot fusion ban, in practical terms, allows each candidate one party designation on the ballot. If multiple parties nominate a candidate, the candidate, not the State, chooses which party name appears on the ballot. Unlike the discrimination against minor parties condemned by this Court, where "a restriction . . . limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," *Anderson*, 460 U.S. at 793, the ballot

fusion ban merely requires a candidate to choose the one party designation that will appear by his name.[5]

D. Respondent Proposes A New Right To A Separate Voting Line.

Respondent argues that not only must fusion be permitted, but that it has a further constitutional right to a separate ballot line for its fusion candidates. Resp. Br. 26-30. The Court should not reach this claim. It is the Court's policy to avoid unnecessary adjudication of constitutional issues. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995). Respondent concedes that it is not necessary to decide whether a separate voting line for each fusion party is constitutionally required. Resp. Br. 12. Petitioners agree that such adjudication is unnecessary. Therefore, the Court should refrain from deciding the issue.

If the Court chooses to address the separate voting line issue, it should reject this additional expansion of political party rights and hold that a separate voting line for each party is not required even if multiple-party candidacies must be permitted. There is no evidence that any disproportionate harm attributable to fusion bans cannot be cured by combined voting lines for major and minor parties nominating the same candidate. A combined voting line removes significant objections raised by

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[5] In any event, the legitimacy of Respondent's concern about the need for a voter cue on the ballot is undermined by the fact that Respondent, like all other parties, is free to communicate its candidate preferences in various ways, including the distribution of written material that voters may refer to while casting a ballot.

Respondent to Minnesota's fusion ban. It permits the minor party not only to nominate the candidate of its choice, but also to appear on the ballot with that candidate.

Respondent contends that a separate voting line is constitutionally mandated because it communicates "indispensable information" from voters to candidates and others because "[i]t tells them what the people want them to do." Resp. Br. 27. Additionally, Respondent argues that separate voting lines for minor parties using fusion allows them "to demonstrate the dimensions of their strength in the general electorate." Resp. Br. 28. Thus, the right to a separate voting line is grounded in Respondent's theories of a right to use the ballot as a mode of political expression and the related right to an electoral system that maximizes the opportunity for minor parties to gain new converts. As demonstrated above and in Petitioners' Brief, those theories have no basis in this Court's decisions or in constitutional principle. Accordingly, the right to a separate voting line should not be created.

II. THE STATE'S JUSTIFICATIONS FOR THE FUSION BAN SATISFY THE *ANDERSON* TEST.

It is worth reiterating that unless a burden on associational rights is severe, the Court has not applied strict scrutiny that requires demonstration of a compelling state interest and narrow tailoring. *Burdick*, 504 U.S. at 434. As demonstrated above and in Petitioners' Brief, the burden on Respondent's associational rights is minimal, at worst. The interests articulated in Petitioners' Brief are sufficient

to justify that burden. Those arguments will not be reiterated here. Several responsive comments are warranted, however.

First, Respondent argues that Petitioners have not sufficiently demonstrated that the problems the ballot fusion ban is intended to prevent would actually occur if the ban were removed. Resp. Br. 35. However, as pointed out in Petitioners' Brief, a state is not generally required to present empirical evidence of harmful effects where, as here, the regulation that allegedly burdens First Amendment rights is intended to protect the act of voting itself. Pet. Br. 41-42, citing *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). *See also Burson v. Freeman*, 504 U.S. 191, 209 n.11 (1992). Respondent argues that the modified burden of proof used in *Munro* and *Burson* is not applicable here. Resp. Br. 35 n.32. However, the cases cited by Respondent requiring a more empirical showing by the state are not from the electoral context and are, therefore, inapposite.[6]

Additionally, in *Burson* the Court recognized the difficulty of the state demonstrating on an empirical basis the disruption of voting that it sought to preclude because bans on campaigning near polling places had been in effect in all states for many years. Similarly, ballot

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[6] *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), concerned a ban on acceptance of honoraria by federal employees; *Edenfield v. Fane*, 507 U.S. 761 (1992), dealt with a state ban on solicitation by certified public accountants; and *Colorado Republican Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996) addressed campaign finance laws. Thus, none involved regulation intended to preserve the integrity of the voting process itself.

fusion has been banned in all but a handful of states for almost a century and has been practiced on an ongoing basis in only one of those handful of states that permit it. Accordingly, there is a very limited base of experience from which empirical evidence could be derived.

Moreover, numerous courts have acknowledged the legitimacy of the concern that fusion ballots can cause voter confusion. Thus, in Minnesota, "the confusion of double designation" did not escape judicial notice. *In re Day*, 102 N.W. 209, 212 (Minn. 1904) (Cant, Spec. J., dissenting).[7] Likewise, the Wisconsin Supreme Court, in upholding the constitutionality of that state's fusion ban, held:

> The confusion and uncertainty that would arise in such a case from the double printing of names, furnishes a strong reason for prohibiting it, and that, with the other reasons mentioned, strongly support the wisdom of the prohibition as a proper legislative regulation.

State ex rel. Runge v. Anderson, 76 N.W. 482, 487 (Wis. 1898).[8]

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[7] The *Day* majority held Minnesota's 1901 ballot fusion ban to be unconstitutional on the ground that the title of the enacting bill did not properly reflect its content. *Day*, 102 N.W. at 211. The ballot fusion ban was reenacted in 1905. 1905 Minn. Rev. Laws, ch. 6, § 176, at 31.

[8] Respondent's portrayal of the enactment of fusion bans around the turn of the century as exclusively or largely driven by animus toward competitive third parties, Resp. Br. 5-10, ignores this contemporaneous judicial recognition of the pitfalls of voter confusion generated by multiple-party candidacies. Moreover, Respondent's argument is based on statements of legislators in other states and generalizations by political

More recently, the Pennsylvania Supreme Court noted that avoiding voter confusion is "precisely the object" of an election code provision prohibiting a political party from nominating an already-nominated candidate for the same office. *In re Street*, 451 A.2d 427, 430 (Pa. 1982). The legitimacy of the state's concern with voter confusion caused by fusion was illustrated in *In re Election of the United States Representative For the Second Congressional District*, 653 A.2d 79 (Conn. 1994). There, the Connecticut Supreme Court rejected a recount petition while noting that the state's ballot fusion had resulted in voter confusion. Thus, the court observed:

> For example, in this election, the name of Joseph Lieberman, a candidate for office of United States Senator, appeared on one line of the ballot as the nominee of A Connecticut Party (ACP) and on another line of the ballot as the nominee of the Democratic Party. This dual listing can lead some voters to mark the names of their preferred candidates at each place where that name appears. Such ballots, crowded with multiple markings for particular candidates, may be difficult for some voters to verify. Voters may be confused because they have mistakenly marked not just their preferred candidate's name as it is listed by two different political parties, but may also have inadvertently marked the names of two different individuals who are candidates for the same office.

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historians. No evidence is presented regarding the 1981 enactment of the Minnesota statute actually at issue here. Although Minnesota initially enacted a fusion ban in 1901, a revised election code, including the fusion ban at issue in this case, was enacted in 1981. Act of April 14, 1981, ch. 29, art. 4, sec. 6, 1981 Minn. Laws 73. General historical animus, even if proven, cannot properly be attributed to later-enacted specific legislation. *See City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion).

Id. at 112-13. Thus, however many turn-of-the-century state legislators may arguably have been motivated by a desire to limit minor party influence in voting for fusion bans, there were (and are) also legitimate ends served, including minimizing voter confusion.

Finally, Petitioners explained the concern about fusion leading to confusing "laundry list" ballots, with many single issue groups appearing as minor parties solely for the purpose of sending a message to the candidate and other minor parties appearing as the candidate's means of signaling his specific platform issues on the ballot. Pet. Br. 42-43. Respondent countered that these concerns can be dealt with by less restrictive means, specifically, by increasing ballot access requirements to make it harder for minor parties to get on the ballot. Resp. Br. 37-38. This alternative would be contrary to Minnesota's policy of allowing easy access to the ballot to encourage diversity of candidates. *See* Minn. Stat. § 204B.08 (1994) (2,000 or fewer signatures required for nominating petitions for various offices). Moreover, the ultimate impact of Respondent's suggestion is that Minnesota should make it more difficult for third parties that want to nominate their own candidate to get on the ballot so that parties who want to nominate someone else's candidate on the ballot can do so. The First Amendment should not be construed to compel that course of action.

III. RESPONDENT'S EVIDENCE OF THE BENEFITS OF FUSION AND THE REASONS FOR THE DECLINE OF THIRD PARTIES IS OPEN TO DEBATE.

Respondent exaggerates the salutary effects of fusion in two respects. First, the evidence of effective use of fusion by minor parties is based primarily on a narrow band of time in the late 19th century, even though fusion was available for a far longer period. Second, experience in recent decades shows a strong minor party presence, which Respondent asserts will result from allowing fusion candidacies, only in one of the seven states that permit fusion. See Pet. Br. 27-28. These are slender reeds on which to support the conclusion that allowing ballot fusion will allow minor parties to thrive and endure as significant players in electoral politics.

Furthermore, Respondent's attempt to illustrate the benefits of fusion by pointing to New York, where fusion is said to "support[ ] a lively minor party tradition" marked by third parties "providing the margin of victory for prominent candidates," Resp. Br. 5-6, presents only part of the picture. Some see a darker side to fusion that infects the entire New York electoral system. Thus, one scholar has concluded:

> [T]he disadvantages of the [New York fusion] system seem clearly to outweigh any possible advantages. . . . [T]he system allows minor parties to wield influence far in excess of their electoral strength . . . [, has] given way to obsession with patronage . . . [and] deprived New Yorkers of . . . a wide variety of candidate choices on election day . . . .

Howard A. Scarrow, *Parties, Elections, and Representation in the State of New York* 73 (1983). *See also New York's Upcoming Non-Elections*, N.Y. Times, September 15, 1996, at A14 (nat'l ed.) (editorial criticism of "nonaggression pacts" between major parties and arguing that major-party cross-endorsements of incumbent candidates absolve them of accountability).

On the other side of the coin, Respondent's conclusion that fusion bans effectively kept the majority party in power and were responsible for the decline of effective third party activity, is also subject to question. For example, Respondent asserts that in Minnesota Republicans won the 15 gubernatorial elections after fusion was banned by the Republican-controlled legislature in 1901. Resp. Br. 8 n.8. On the contrary, non-Republicans won one-third of those 15 races – in 1904, 1906, 1908, 1914 and 1930. *Minnesota Legislative Manual* 173 (1995-96).

Likewise, Respondent's effort to paint in darkest tones the supposed historic adverse effects of fusion bans on third parties is unbalanced at best. As one of the amici professors has written, fusion itself "sometimes helped destroy individual third parties . . . . " Peter H. Argersinger, " 'A Place on the Ballot': Fusion Politics and Anti-fusion Laws," in *Structure, Process, and Party: Essays in American Political History* 151 (1992). The view advanced by the amici professors – that fusion bans helped destroy third parties and reduce voter participation, Amici Prof. Br. 7-12 – is at least debatable. The negligible impact of fusion bans on third-party voting is reflected in its absence from a recent study of factors that inhibit third-party presidential voting. Steven J. Rosenstone, et al., *Third Parties in America: Citizen Response to Major Party Failure* 19-25 (1984). *See also Williams v. Rhodes*, 393 U.S.

23, 60 (1968) (Stewart, J., dissenting) (attributing two-party system to confluence of social/political forces rather than consequence of legal restrictions on minor parties). Furthermore, the notion that fusion bans somehow reduce voter participation, even if relevant to the constitutional analysis, is not reflected in recent election data. Voter turnout is significantly higher in Minnesota, where fusion is banned, than in New York, where fusion is most widely practiced. U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1995*, Table No. 462 at 291 (showing Minnesota voting rate 18-28 percentage points higher than New York voting rate between 1988 and 1994).

CONCLUSION

For the foregoing reasons and the reasons presented in Petitioners' Brief, the judgment of the court of appeals should be reversed.

Dated: October, 1996

Respectfully submitted,

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